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ABSTRACT

Church-related colleges are facing the problem of pleasing both their sponsoring churches and the government in order to obtain the funding from each agency that is needed for the survival of the institutions. To solve the political problem, the church-related colleges must persuade the legislatures, both state and federal, to include them in constitutionally permissible ways in substantial programs of public assistance to higher education. To solve the ecclesiastical problem, the church-related colleges must persuade the churches with which they are affiliated that despite the changes they have to make in order to satisfy the judicial and legislative branches of the government, they remain a vital and indespensable ministry of the churches, well worth their cost in terms of personnel and money. (Author/HS)

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The Church, the College, and the State--

Changing Patterns of Relationship

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This paper will be brief, because my thesis is simple and rests upon facts too well-known to require extensive detailing. The thesis is that many church-related colleges are caught in a tug-of-war between the government and the churches. More specifically, many church-related colleges are caught in a tug-of-war between supposedly liberal judges and politicians and admittedly conservative or middle-of-the-road churchmen, alumni and parents. The root of the evil, as always, is money.

By and large, church-related colleges depend on both governmental and ecclesiastical support, as well as upon tuition and the income from modest endowments and annual alumni giving. In the fiscal crisis which they share with all American higher education, church-related colleges cannot afford to lose either governmental or ecclesiastical support. Why has it become so difficult to keep both, and is there any hope for the long-range future?

It is a mistake, of course, to speak of church-related colleges as though they were all of one mold. The colleges are at least as various as the churches with which they are affiliated, and the degree of affiliation runs from the extreme of almost sheer nominalism at one end of the spectrum to the extreme of almost total control of the daily life of the institution at the other.

In order to rest on a solid factual basis for my remarks, I shall speak mainly of the church-related institutions with which I am most familiar: Catholic colleges and universities, especially those that have a strong relationship with a religious order of men or women in terms of the membership of their boards of directors, their administrative staffs and their faculties. To the extent that other church-related colleges have the same type of strong relationship with a particular church or ecclesiastical organization, my remarks will also apply to them.

The changes we see going on in the kind of church-related colleges of which I am speaking--changes in the statement of objectives, changes in the composition of the board of trustees, changes in the kind of people selected to fill top administrative posts, changes in the religious commitment and experience of faculty members, changes in the religious curriculum, and changes in the norms of student discipline--all of these are the products of many different forces, some of which have been operative for a long time in American higher education. I think, however, that at the present time we can identify three particular forces which, if not entirely new, are displaying unusual energy and intensity. These forces create three problems which the church-related colleges

must solve if they are to survive and prosper. These problems are:

1. the constitutional problem;

2. the political problem; and

3. the ecclesiastical problem.

To solve the constitutional problem, the church-related colleges must persuade the courts (and, in particular, a majority of the United States Supreme Court) that the No Establishment Clause of the First Amendment is not a bar to their participation in financially meaningful forms of governmental assistance.

To solve the political problem, the church-related colleges must persuade the legislatures, both state and federal, to include them in constitutionally permissible ways in substantial programs of public assistance to higher education.

To solve the ecclesiastical problem, the church-related colleges must persuade the churches with which they are affiliated that despite (or, in some cases, even because of) the changes they have to make in order to satisfy the judicial and legislative branches of the government, they remain a vital and indispensable ministry of the churches, well worth their cost in terms of personnel and money.

Manifestly, the church-related colleges face an enormous task. It may even prove to be an impossible task. But, in my judgment, there are certain principles in the American political and academic tradition which, if seriously reaffirmed by the government, the churches and the colleges, will carry these educational institutions through their current crisis. These principles are the principles of voluntarism, pluralism and academic freedom.

It is especially important for the courts to recognize the validity of the principle of voluntarism. What the courts have been doing, under the impetus of the Horace Mann and Tilton cases, is to inquire into the degree of church-relatedness that exists at a particular church-related college. In litigation now pending in Maryland, church-related colleges have been asked to respond to some 42"interrogatories," among which are the following:

"8. State, for each year from January 1, 1967, to date," or the nearest fiscal years thereto if on a fiscal year, the following:

a. your total capital funds;

b. the total amount of your capital funds contributed or otherwise paid by the Catholic Church and all of the affiliated organizations of said Church;

c. your total operating funds; and

d. the total amount of your operating funds contributed or otherwise paid by the Catholid Church and all of the affiliated organizations of said Church.

"12. State whether you consider the religious preference of applicants for positions on your faculty, and, if so, state how religious preference bears upon whether any such applicants are hired. Please attach a blank copy of all application forms which you used for faculty applicants since January 1, 1967; and, as to each such document of which a copy is not attached to your answers, identify the custodian or custodians thereof.

"17. State whether you have made any efforts within the last five years to maintain any religious balance and/or quota among your faculty. Also, state whether you have made any such efforts as to your students. If so, identify by date, title, or other sufficient identification all documents pertaining to any such religious balance and/or quota, and please attach a copy of each such document to your answers. As to each such document of which a copy is not attached to your answers, identify the custodian or custodians thereof.

"28. List, for the academic years 1967 through 1972, all religious observances, ceremonies, and/or services which took place at or under the sponsorship of your institution within

one week preceding your graduation ceremonies. Please attach to your answers copies of all programs for graduation week functions for each of the years designated above. As to each of the foregoing programs of which a copy is not attached to your answers, identify the custodian or custodians thereof."

The interrogatories continue on and on, searching for every last trait of church-relatedness. The theory of the interrogatories is obvious: a little church-relatedness is all right; a lot raises constitutional barriers to participation in federal and state programs of assistance to higher education. The interrogatories are not concerned with whether the college is a college; they are concerned solely with the degree of church-relatedness.

What I see in these interrogatories, and in the legal theory that supports them, is an attempt at logical expansion of the constitutional doctrine that neither the federal nor the state governments may support a church. That doctrine, without any doubt, is part of the bedrock of our constitutional law. Difficulties arise, however, when the churches step outside the world of worship and belief, and enter into the world of secular affairs. Hybrid organizations, like hybrid plants, do not yield to simple classifications.

If the government may aid colleges but may not aid churches, what may the government do with a church-related college or a college-related church?

When the Supreme Court faced this question in Tilton v. Richardson, it gave an ambiguous answer. The court split 4+1-3+1, with a resultant 5-4 majority in favor of the participation of four Catholic colleges in Connecticut in the Higher Education Facilties Act. Now one of the justices in the majority (Harlan) and one of the justices in the minority (Black) are dead. Justices Powell and Rehnquist have succeeded them. What does the new court think of the eligibility of church-related colleges for participation in governmental programs of assistance to higher education?

At least part of the answer should be forthcoming in the new dourt's decision in Hunt v. McNair, a case that will be argued sometime this winter or spring and, presumably, decided by the end of June. The Hunt case involves the South Carolina Educational Facilities Authority Act, which authorizes the state to issue, sell and service tax-free revenue bonds to obtain funds which are then made available to private colleges for the construction of facilities. The Baptist College at Charleston received a loan under this

statute that enabled the college to refinance its outstanding indebtedness incurred for the construction of buildings and facilities as well as to construct additional facilities.

When the Supreme Court had the Tilton case under consideration, it also had on its docket both the Hunt case and a fairly similar New Jersey loan case, Clayton v. Kervick. After the Supreme Court decided the Tilton case, it remanded the Hunt and Clayton cases to the South Carolina and New Jersey Supreme Courts for reconsideration in light of the Tilton decision. Both state courts reaffirmed their original decisions upholding the constitutionality of the loan programs. Clayton was not reappealed to the United States Supreme Court, but Hunt was and the court has set the case for full consideration. Briefs have already been filed by both sides, so that the next stage will be the oral argument.

At the outset of this discussion of the recent college aid cases, I said that it was especially important for the courts to recognize the validity of the principle of voluntarism. Instead of inquiring minutely into the degree of church-relatedness of a college, the courts should be concerned with freedom of choice in higher education. As long as the college is providing educational services that are generally recognized as beneficial to the community, the community--including its governmental organs--should be free to help the college

continue to render those services. The ban on governmental aid to churches as such should be maintained in its true historical meaning and context, not expanded to strangle the development of church-related-colleges. Fear that the churches will prosper if their colleges are allowed to compete in the academic marketplace is, when all is said and done, a fear that if adults are given freedom of choice, they will include religious values in their life commitment. There is nothing in the First Amendment that was intended to prevent that result.

Given the decision in the Tilton case, however, it is unlikely that the present Supreme Court will issue a decision in the Hunt case that will entirely relieve church-related colleges of their anxieties about eligibility for participation in governmental assistance to higher education. The court will probably spell out more clearly than it did in Tilton what the conditions of eligibility are. Given the need for governmental assistance, many church-related colleges will make the adjustments necessary to meet those conditions. Making these adjustments will inevitably create more tension between these colleges and the churches with which they are affiliated.

The tension will probably center on issues that are commonly identified by the academic community as issues of academic freedom.

The churches that sponsor and assist colleges do so because they consider colleges an important ministry to themselves and to the entire community. To the extent that religious values are minimized in the name of academic freedom, the importance of the ministry will become less and less evident to the churches. What is necessary, if the new tensions caused by constitutional restrictions are to be resolved, is that some churches must be willing to give more ground than they have in the past in the area of academic freedom. Selection of faculty and administrative staff, design of the curriculum, and student publications and organizations are obvious instances of potential conflict.

Even if the courts, the churches and the colleges can get together, the political problem will remain. The political problem consists in persuading the legislature (and therefore the public) that church-related colleges are at least relatively economical, efficient and important. The principle of pluralism in higher education must be strongly stressed, because it is precisely in our tradition of pluralism and the values that tradition preserves that the basic importance of church-related colleges rests. It is simply not true that one giant state university, or a collection of mini-giants, will reflect as many human values as a partnership of

both public and private (including church-related) institutions.

To some, the problems generated by the changing patters of relationship between the church, the college and the state may seem insoluble. I do not think they are, providing everyone concerned holds firmly to our traditional principles of voluntarism, pluralism and academic freedom.